No. 89-482

In The

Supreme Court of the United States

October Term, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

BARBARA ANN WASHINGTON, as Guardian Ad Litem for CHRISTA M. WASHINGTON, a Minor,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PATTERSON, RITNER, LOCKWOOD, ZANGHI & GARTNER
JOHN ZANGHI
GREGORY P. ORLAND*
3580 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90010
Telephone: (213) 487-6240

GREINES, MARTIN, STEIN & RICHLAND
MARTIN STEIN
KENT L. RICHLAND
BARBARA W. RAVITZ*
9601 Wilshire Boulevard, Suite 544
Beverly Hills, CA 90210-5215
Telephone: (213) 859-7811

*Counsel of Record
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The court of appeals determined that two servicemen who negligently injured a young girl were within the scope of their employment under California law so as to subject the government to liablity under the Federal Tort Claims Act for the severe injuries they caused. Is the question whether the court sufficiently analyzed state law "special and important" enough to merit certiorari review by this Court?

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Respondent Barbara Ann Washington, as Guardian ad Litem for Christa M. Washington, a Minor, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 868 F.2d 332 (1989).[1]

[1] On October 12, 1989, the Clerk of the Court extended the time for filing respondent's brief to and including November 14, 1989.

INTRODUCTION

In 1980 ten-year old Christa Washington suffered severe burns over much of her face and body due to the conceded negligence of two Navy servicemen in the base housing area of the Naval Air Station at Point Mugu, California. The Court of Appeals for the Ninth Circuit held the servicemen were acting within the scope of their employment within the meaning of the Federal Tort Claims Act when the incident happened and thus found the government liable for Christa's injuries on the basis of respondeat superior.

In its sole Question Presented, the government claims the court reached this conclusion without determining whether an analogous private employer would be liable under state law, as required by the FTCA. It asks this Court to reverse and remand so the court of appeals can make that determination. It seeks to ascribe to the Ninth Circuit the view that the FTCA's state law requirement does not apply to torts occurring on military bases because they are "unique." But as we show, the Ninth Circuit has never adopted that simplistic notion, and has conscientiously applied state law in this case as in each of its decisions in this area. Indeed, in the decision below, the court states expressly, "In this case California law applies," and sets out California's two-prong test for respondeat superior liability. *Washington v. United States*, Appendix to Petition for Certiorari, 5a.

The government's real complaint is that it does not like the result reached by the court of appeals; no doubt it is unhappy that "California defines 'scope of employment' very broadly" (*id.*) and that California law requires

respondeat superior liability in this case. Of course, the government knows the futility of asking this Court to review questions of state law; consequently, it has tried to cast the issue as one of federal law. As we show below, that issue is a false one, since the Ninth Circuit fully complied with the requirements of the FTCA. And if the court's analysis of state law is less detailed or precise than the government would have liked, that is hardly a "special and important" reason to grant certiorari. In any event, the court's imposition of liability on the government is supported by three different bases under California law.

Obviously aware of the shakiness of its ground, the government seeks to increase its chances for review by suggesting a conflict among the circuits. As we demonstrate, there is no conflict between the Ninth Circuit's decision in this case and the decision of any other circuit, and any appearance of a conflict with respect to other Ninth Circuit decisions is illusory.

Christa Washington has waited almost half her life to be fairly compensated for the terrible injuries she received. The government has raised no question qualifying for review by this Court, and its petition should be summarily denied so the district court can determine Christa's damages as the Ninth Circuit ordered.

STATEMENT OF THE CASE

A. Statement Of Facts.[2]

At 6:40 p.m., on September 19, 1980, in the base housing facilities of the Navy at Point Mugu, California, two active duty members of the Navy, Larry Bartole and Neil Cleaves, were attempting to start Cleaves' 1964 Rambler. The car was in the garage assigned to Cleaves. It had not been operating for several months. Cleaves had given it a basic tune-up and oil change and it still would not run.

The main garage door was closed; a side door was open. Cleaves was in the car, turning on the ignition at Bartole's direction. Bartole tried to prime the carburetor by pouring gasoline from a coffee can into the throat of the carburetor. The engine backfired. Flames shot from the carburetor. Bartole jerked the can back and spilled gas over his hand. His hand caught fire. He ran to the side door, tripped and sent the blazing can out the door into the yard. Christa Washington was just outside the door playing with friends. She was struck by the fiery gasoline. It severely burned the right side of her head, face and neck and right shoulder, arm, wrist and hand.

At the time of the incident Bartole and Cleaves were on authorized liberty status and had completed their ordinary work for the day for the Navy. Christa, aged ten, was the daughter of a serviceman residing in a naval housing unit at Point Mugu. Her family's unit was directly across from Cleaves'. The great majority of the

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[2] This statement, with minor changes, is taken from the court of appeals' opinion.

567 housing units at the base were occupied by families with more than one child. Cleaves' home was a popular place for neighborhood children to gather.

A Navy regulation provided that "only repairs of a minor nature such as basic tune-up, brake adjustments and oil changes may be accomplished in public quarters garages or the Hobby Shop spaces." A booklet issued to all servicemen housed on the base carried an introductory message from Captain James E. Webb, commanding officer of the Naval Air Station. Captain Webb stated: "This brochure provides . . . the necessary regulations and rules for your assistance and guidance throughout your stay in government quarters." Within this booklet a section was entitled, "Fire, Safety and Police Regulations" and contained directions on gasoline storage but nothing specifically on the use of gasoline to prime carburetors.

Other regulations issued on January 5, 1979 and in effect at the time of the incident were explicitly directed to fire prevention. These regulations provided that "the prevention of fire in administrative and quarters area is a moral and legal responsibility of all personnel, requiring alertness, strict adherence to fire regulations, and intelligent application of fire prevention safeguards. Fire hazards are not acceptable within the naval establishment. The goal of fire prevention and protection programs is the *total prevention* of loss of life and property by fire." (emphasis in original). These regulations specified that "Personnel" as well as "Public Quarters Residents" were responsible for "compliance with Fire Regulations," and that "Public Quarters Residents" were responsible for "application of fire prevention safeguards in Quarters

housing and facilities." One of the Fire Regulations that accompanied this regulation stated: "*Fire Hazardous Operations* shall not be conducted prior to establishment of adequate fire prevention measures and approved by the Fire Chief." (emphasis in original).

These regulations were not intended as mere guidelines, but were duties with which all personnel and base residents were obligated to comply at all times, even when on "liberty" status. Navy personnel were subject to military discipline for failing to comply with the regulations.

A report to the Navy on the accident by Ensign David M. Anderson, Jr. stated that "[g]asoline should have been added to the gas tank rather than directly to the carburetor, . . . [a]n accepted primer spray should have been used rather than gasoline to prime the carburetor, . . . [u]sing an open coffee can to prime the carburetor was a contributing factor in the accident," and "[u]sing gasoline to prime the carburetor is not a safe practice but is relatively common."

B. Procedural History

Christa Washington, through her mother as guardian ad litem, sued the United States under the Federal Tort Claims Act ("FTCA").[3] Judgment was for the United States. The district court concluded Bartole and Cleaves

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[3] Bartole and Cleaves were dismissed as defendants early in the litigation. After contending at trial that the men were not negligent, the government conceded their negligence in the court of appeals.

were not acting within the course and scope of their employment. It also concluded the men "did not violate any applicable Naval regulation," thus distinguishing the case from *Lutz v. United States*, 685 F.2d 1178 (9th Cir. 1982). Appendix to Petition ("Pet. App."), 13a.

The court of appeals, in an opinion by Judge Noonan, reversed.[4] The court held Bartole and Cleaves were acting within the scope of their employment, as broadly defined under California law, and remanded for the limited purpose of determining damages. Pet. App., 7a.

The United States petitioned for rehearing with a suggestion for rehearing en banc, on grounds similar to those it now raises in the present petition. The panel denied the petition and noted the full court had been advised of the suggestion for en banc rehearing, and no judge requested a vote on the matter. *Id.* at 16a.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

CONTRARY TO THE GOVERNMENT'S CONTENTION, THE COURT OF APPEALS DID BASE ITS DECISION ON STATE LAW.

The sole question presented in the petition asks whether the "court of appeals erroneously failed to determine whether under state law an analogous private employer would be liable under similar circumstances."

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[4] We discuss the details of the court's opinion in the body of the brief.

The government claims the Ninth Circuit failed to consider state law in this and two other FTCA cases. Pet., 6-7. It states it is not asking this Court to determine California law on the issue, but only "to reverse and remand with instructions that the court of appeals make that determination." Pet., 8, n. 6.

But the court of appeals has already done so, as is clear from a reading of its entire opinion, not just the portions excerpted in the government's petition. After setting out the applicable statutory framework linking the scope of employment of a military member to the state law of respondeat superior, the court states:

> *In this case California law applies.* California defines "scope of employment" very broadly. *Doggett v. United States*, No. 86-6109, slip op. at 12432 (9th Cir. Oct. 3, 1988). The California test for determining scope of employment "turns on whether '(1) the act performed was either required or "incident to his duties" . . . , or (2) the employee's misconduct could be reasonably foreseen by the employer in any event.' " *Id.* (quoting *Jeffrey Scott E. v. Central Baptist Church*, 197 Cal.App.3d 718, 243 Cal.Rptr 128, 129 (1988)). Pet. App., 5a. (Emphasis added.)[5]

The government complains that this is "the only citation to state law in the court of appeals' opinion. . . ." Pet., 7, n. 3. But it is the only one needed, for it accurately

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[5] The court then distinguishes the case on which the government had relied, *Hartzell v. United States*, 786 F.2d 964 (9th Cir. 1986), in part on the ground that its holding that the service person was not within the scope of her employment was mandated by the applicable state law of Arizona. Pet. App., 5a.

and succinctly sets out Califoria's well-established two-prong test for respondeat superior liability. See also, e.g., *Clark Equipment Co. v. Wheat*, 92 Cal.App.3d 503, 520, 154 Cal.Rptr. 874, 882 (1979); *Alma W. v. Oakland Unified School Dist.*, 123 Cal.App.3d 133, 138, 176 Cal.Rptr. 287, 289 (1981), cited with approval in *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438, 447, 769 P.2d 948, 256 Cal.Rptr. 766, 771-74 (1989). The court impliedly holds there is respondeat superior liability under the first prong of the test, i.e., an act performed incident to Bartole and Cleaves' duties – duties which the court holds included the "military duty to assure security in military housing" (Pet. App., 5a) and a "military duty [not to engage in fire hazardous operations without the establishment of adequate fire prevention measures] imposed for the benefit of the Navy by Navy regulations. . . ." Pet. App., 6a.

There can be no doubt that in reaching the conclusion that the government is vicariously liable for Bartole and Cleaves' negligence, the court of appeals applied state law.[6] California's law of respondeat superior was exhaustively briefed by both parties and was squarely before the court. Whether the court of appeals could have cited more authority, or provided a more detailed analysis, or stated its conclusions more directly simply are not "special and important" questions that merit the expenditure of this Court's resources.

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[6] Similarly, the Ninth Circuit grounded its decision in state law in the two other decisions which the government claims contain no consideration of state law, *Lutz v. United States*, 685 F.2d 1178, 1183 (9th Cir. 1982) and *Doggett v. United States*, 875 F.2d 684, 688 (9th Cir. 1989).

(Continued on following page)

Despite the government's insistence that it seeks only to have the court of appeals make a determination based on state law, its real complaint is obvious – it disagrees with the court's *conclusion* regarding state law. The subtext of the government's argument is that under a correct application of California law, it could not be found liable for Bartole and Cleaves' negligence. Indeed, it suggests that the district court judge, who found no respondeat superior liability, may have had a better understanding of California law than the court of appeals judges by virtue

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In *Lutz*, the court discusses Montana's law of respondeat superior at some length. 685 F.2d at 1182-83. According to the court, the Montana test differentiates between an employee who acts purely for his own benefit and one who is delegated a task which furthers his employer's interest. *Id.* at 1182. The district court had found that the serviceman's decision to own a dog was purely for his own benefit, and thus concluded there was no respondeat superior liability. But the court of appeals held the scope of employment analysis must be applied, not to the decision to own a dog, but to the "acts or omissions in controlling the dog. . . ." *Id.* The government delegated to servicemen who lived on base "a specific military duty" to control their dogs, "the performance of which furthered the interests of the Air Force. . . ." On that basis the court concludes the serviceman "therefore acted in the line of duty and within the scope of his employment." *Id.* at 1183.

In *Doggett*, the court of appeals expressly states, "Under the FTCA, the question of liability is determined with reference to state law" (875 F.2d at 686), and goes on to discuss California's broad test for scope of employment. *Id.* at 687. In fact, the court observes that California's principles of respondeat superior might support an even broader imposition of liability than the plaintiff was seeking. *Id.* at 687. The case also contains an extensive discussion of negligence principles under California law. *Id.* at 688-94.

of having served as a municipal and superior court judge in California. Pet., 8. But as the Ninth Circuit has noted, consideration of such matters "is neither proper nor efficient. It shifts the focus from the appropriate legal authorities to the biography of the judge." *Matter of McLinn*, 739 F.2d 1395, 1400 (9th Cir. 1984) (en banc). The Ninth Circuit properly gives no special deference to the district court's interpretation and application of state law but reviews those questions de novo. *Id.* at 1397.

The government's disingenuousness regarding the true basis of its disagreement with the court of appeals is understandable. This Court has made very clear its disinclination to review the correctness of determinations of state law made by the courts of appeals. See, e.g., *U.S. v. S.A. Empresa De Viacao Aerea Rio Grandense*, 467 U.S. 797, 816, n. 12 (1984) ("we generally accord great deference to the interpretation and application of state law by the Courts of Appeals"), *Pacific Gas & Elec. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 214 (1983) ("Our general practice is to place considerable confidence in the interpretations of state law reached by the federal courts of appeals"), *Runyon v. McCrary*, 427 U.S. 160, 181 (1976) ("We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so heavily contingent upon an analysis of state law. . . ."). So rather than claim the court of appeals erred in determining state law, the government asserts it erred "as a matter of federal law" in failing to consider state law (Pet., 6-7) – an assertion belied by the opinion itself.

The court of appeals' consideration and treatment of state law was proper and adequate. Since this is the only

question presented in the petition, the petition should be denied for that reason alone.

II.

THE COURT OF APPEALS' DECISION IS CORRECT ON THREE DIFFERENT BASES UNDER CALIFORNIA LAW.

Granting the government's request to remand this case to the court of appeals to consider state law would accomplish nothing, since the result the court reached is supported by at least three different theories under California law, any one of which is sufficient to support its ruling. All three bases were thoroughly briefed by both sides. In light of this Court's understandable reluctance to involve itself in disputes concerning state law, we summarize the applicable state law in the briefest fashion to demonstrate not only the correctness of the court of appeals' decision but the futility of a remand.

A. Under The First Prong Of California's Respondeat Superior Test, The Servicemen Were Within The Scope Of Their Employment At The Time Of The Accident Because Their Employment Duties Included Complying With Regulations Requiring Them To Secure The Base Against Fire Hazards – Regulations Enforced Through The Threat Of Military Discipline.

California has a two-prong test to determine an employer's vicarious liability for its employee's torts. Under the first prong, liability is imposed if "the act performed was either required or incident to his duties." *Alma W. v. Oakland Unified School Dist.*, 123 Cal.App.3d

133, 139, 176 Cal.Rptr. 287, 289 (1981). Those "duties" necessarily include all the requirements, rules and regulations the employer imposes on the employee. If the employee performs his duties negligently, and as a result injures someone, the employer is vicariously liable.

In this case, Bartole and Cleaves' employment duties included complying with specific fire prevention regulations in addition to performing their ordinary Navy jobs.[7] The Navy considered those duties every bit as important as satisfactory "job" performance. After all, they were designed, in part, to protect the Navy's own property and employment force. The Navy promulgated the regulations because "[f]ire hazards are not acceptable within the naval establishment. The goal of fire prevention and protection programs is the *total prevention* of loss of life and property by fire." The Navy made clear that the regulations were not mere guidelines but were mandatory requirements enforced by threat of military discipline. Military members were required to comply with the regulations even when on "liberty" status. When Bartole and Cleaves attempted to start a car in an exceedingly hazardous way, they violated their naval employment duties just as plainly as if they had negligently repaired a submarine. As the Fifth Circuit has noted in this context, "Soldier was a repair parts specialist and had a duty to mow a

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[7] For example, one regulation provided:

> *Fire Hazardous Operations* shall not be conducted prior to establishment of adequate fire prevention measures and approved by the Fire Chief.

This regulation was imposed on "Personnel" as well as "Public Quarters Residents." C.A. E.R., Exh. D, at 3.

portion of the lawn surrounding his quarters. Both were duties assigned to soldier." *Craft v. United States*, 542 F.2d 1250, 1255 (5th Cir. 1976).

It is in this context that the Ninth Circuit's reference to the "uniqueness" of military base housing incidents is best understood: *Washington v. United States*, Pet. App., 5a, quoting *Lutz v. United States*, 685 F.2d 1178, 1183 (9th Cir. 1982). The court does not mean they are "unique" in the sense that they are exempt from normal FTCA principles – the position the government seeks to ascribe to the Ninth Circuit. Rather, when the military, as employer and provider of housing, imposes duties on its employees that continue even during their off-duty, at-home hours, "claims involving base residents require close examination of the employee's actions and the employer's interest in them." *Washington v. United States*, Pet. App., 6a, quoting *Lutz*, 685 F.2d at 1183. That sort of "close examination" animated the Ninth Circuit's finding of liability in this case, as in *Lutz*.

Further support for this conclusion is found in California's "bunkhouse rule" which provides that an employee who lives on the employer's premises may be acting within the scope of his employment even while engaged in leisure pursuits during off-duty hours if he is making reasonable use of the employer's premises. *Argonaut Ins. Co. v. Workmen's Compensation Appeals Bd.*, 247 Cal.App.2d 669, 677-78, 55 Cal.Rptr. 810, 818-19 (1967); *Rodgers v. Kemper Constr. Co.*, 50 Cal.App.3d 608, 620, 124

Cal.Rptr. 143, 149-150 (1975).[8] The California Supreme Court has declared that the rule applies even when the employee, while not required to live on the premises, receives lodging as part of his compensation. *Truck Ins. Exchange v. Ind. Accident Comm'n*, 27 Cal.2d 813, 816-17, 167 P.2d 707-08 (1946); see also *Petray v. Keeble*, 15 I.A.C. 62 (1928) ("normal activity connected with the use of living quarters provided by the employer as a part of the contract of hire is incidental to the employment, and injury while engaged in such activity arises out of the employment").

On facts similar to those in this case, a laborer who lived in a cabin on his employer's ranch was burned on a Sunday as he stood on ranch premises watching his employer's brother attempt to start an automobile by priming it with gasoline. The gasoline suddenly burst into flames, and the brother threw it over his shoulder to get rid of it; it struck the employee, burning him. The Commission ruled the injury was compensable even though the employee was dressed in his Sunday clothes and was planning to go to town to spend the day as he pleased. It found that the injury arose out of the employment, concluding "the risk from instrumentalities permitted by the employer to be on the premises was a risk of the employment." *American Motorists Ins. Co. v. Ind. Accident Comm'n*, 4 Cal.Comp. Cases 251, 252 (1939). So, too, the risk from the instrumentalities (automobiles and

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[8] California courts frequently rely on workers' compensation cases in analyzing respondeat superior issues. *Perez v. Van Groningen & Sons, Inc.*, 41 Cal.3d 962, 967-68, 719 P.2d 676, 227 Cal.Rptr. 106, 108 (1986); *Hinman v. Westinghouse Elec. Co.*, 2 Cal.3d 956, 960, 471 P.2d 988, 88 Cal.Rptr. 188, 190 (1970).

gasoline) permitted by the Navy to be in the base housing area was an inherent risk of the employer's operation.

Thus, the Ninth Circuit's approach fully comports with California law imposing vicarious liability on employers for their employees' torts occurring at a time and place where the employee is subject to the employer's regulations. Since an analogous private employer could be found vicariously liable under California law, the Ninth Circuit's decision was correct.

B. Under The Second Prong Of California's Respondeat Superior Test, The Servicemen Were Within The Scope Of Their Employment At The Time Of The Accident Because Their Negligent Acts Were Reasonably Foreseeable Risks Inherent In The Navy's "Enterprise" Of Providing Living Quarters For Military Personnel.

California has long recognized that an employer's responsibility for the torts of its employees extends beyond acts which are required or incident to their employment duties, and includes acts which are "inherent in or created by the enterprise." *Hinman v. Westinghouse Elec. Co.*, 2 Cal.3d at 960, 471 P.2d 988, 88 Cal.Rptr. at 190 (1970).

> One way [California courts] determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, "foreseeability" in this context must be distinguished from "foreseeability" as a test for negligence. In the latter sense "foreseeable" means a level of probability which would lead a prudent person to take

> effective precautions whereas "foreseeability" as a test for *respondeat superior* merely means that in the context of the particular enterprise *an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.* [Citations.] In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer. *Rodgers v. Kemper Constr. Co.*, 50 Cal.App.3d at 618-19 (emphasis added).

Rodgers' foreseeability test has been approved by the California Supreme Court. *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438, 450, n. 9, 769 P.2d 948, 256 Cal.Rptr. 766, 773, n. 9 (1989); *Perez v. Van Groningen & Sons, Inc.*, 41 Cal.3d at 967-68, 719 P.2d 676, 227 Cal.Rptr. at 107-08.

Applying the risks of the enterprise/foreseeability test to the facts of this case leads to only one conclusion – Bartole and Cleaves were within the scope of their employment at the time of the accident.

The enterprise in question is the United States armed services. The function of the armed services is to protect and defend the United States at all times. *United States ex rel Toth v. Quarles*, 350 U.S. 11, 17 (1955) (it is "the primary business of armies and navies to fight or be ready to fight wars should the occasion arise"); *Brown v. Glines*, 444 U.S. 348, 354 (1980) ("Military personnel must be ready to perform their duty whenever the occasion arises"). Providing on-base housing for military personnel and their families is an integral part of carrying out the function of protecting and defending the United States. It ensures

that personnel are nearby in case of emergency even during off-duty hours. It is indisputable that the United States (as well as its citizens) benefits immeasurably from having a large contingent of personnel available 24 hours a day all over the world to carry out its aims.

The question under California law is whether Bartole and Cleaves' actions were foreseeable – were they so "unusual or startling" that it would seem unfair to include the loss resulting from them among other costs of the employer's business? Clearly not. When an employer undertakes to provide housing accommodations – including garages – for its employees and their families, and permits them to bring private automobiles on the property, to repair them and to store gasoline, it can hardly be said to be unusual, startling, unreasonable or unforeseeable for an accident such as befell Christa Washington to occur.[9]

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[9] The government suggests a contrary result would obtain under *Martinez v. Hagopian*, 182 Cal.App.3d 1223, 227 Cal.Rptr. 763 (1986). Pet., 7, n. 4. But as respondent demonstrated in the Ninth Circuit, *Martinez* is completely distinguishable. Briefly, in that case a worker killed a visitor during a drunken brawl at a farm labor camp after working hours. The Court of Appeal held the worker was not within the scope of his employment. The only duties the employer imposed on his employees were to harvest grapes and refrain from drinking during working hours. 182 Cal.App.3d at 1226, 227 Cal.Rptr. at 765. Unlike the employees in this case, the farm workers were under no duty to maintain the security of the labor camp or prevent fights, drinking, fires, or anything else. In fact, during off-duty hours, laborers were "free to do 'anything at the time the law permit[s] them to do.' " *Id.* In contrast, Bartole and Cleaves were obligated to comply with military regulations at all times, even when on "liberty status."

The California Supreme Court's latest articulation of the rationale underlying the respondeat superior doctrine reinforces this conclusion. In *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438, 451, 769 P.2d 948, 256 Cal.Rptr 766, 773-74 (1989), the court noted three principal reasons for imposing liability on an enterprise for the risks incident to it: (1) It tends to provide a spur toward accident prevention; (2) it tends to provide greater assurance that accident victims will be compensated (i.e., through insurance); and (3) it tends to provide reasonable assurance that, like other costs, accident losses will be broadly and equitably distributed among the beneficiaries of the enterprise. The issue in *John R.* was whether a school district is liable when a teacher sexually molests a student. Based on an analysis of the three factors, the court found no respondeat superior liability.

All three considerations point toward liability in this case. First, by imposing liability, the government would have added impetus to attempt to prevent the kind of accident that occurred here – for example, by forbidding automobile repairs (especially those involving gasoline) in base housing areas or, at a minimum, in unventilated areas. Second, finding the government liable for Christa's injuries assures she would be compensated for them. This factor is extremely important in this case, since – unlike the sexual molestation in *John R.* – Bartole and Cleaves' negligence in repairing the car was within "the normal range of risks for which costs can be spread and insurance sought." *John R.*, 48 Cal.3d at 451, 256 Cal.Rptr. at 774. Moreover, not only did the Navy not require or even suggest service people should purchase homeowner's or renter's liability insurance, it misled them into believing

they did not need it. The Navy recommended that, for their own protection, base residents purchase insurance for damages to personal household goods. "The Government doesn't assume responsibility for loss of your personal property through fire, theft, or other means." C.A. E.R., Exh. B at 34. It is unconscionable that the government did not see fit to tell service people it also does not assume responsibility for liability for their injuries to human beings. Third, imposing liability for Christa's injuries on the government assures that the costs would be spread among all the beneficiaries of the enterprise that is the United States armed services (i.e., tax-payers) and not fall solely on one wholly innocent victim.

Bartole and Cleaves were within their scope of employment under the "foreseeability" prong of California's respondeat superior test. The Ninth Circuit's imposition of liability on the United States was correct under this aspect of California law.

C. In Addition To Being Vicariously Liable For Christa Washington's Injuries On The Basis Of Respondeat Superior, The United States Was Directly Liable Under California Law As A Landowner On Whose Property Dangerous Activities Took Place With Its Knowledge.

A third theory supports the Ninth Circuit's decision – direct landowner liability.[10] California has long imposed

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[10] The United States, as owner and operator of the naval base, is liable to the extent a private party would be under similar circumstances. State law determines such liability. *Henderson v. United States of America*, 846 F.2d 1233, 1234 (9th Cir. 1988).

on landowners the duty to take appropriate measures to restrain activity of which the landowner is or should be aware, and which the landowner should realize is dangerous. *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 810, 167 P.2d 729, 733 (1946). The landowner has a duty " 'to take affirmative action to control the wrongful acts of third persons which threaten invitees where the [owner] has reasonable cause to anticipate such acts and the probability of injury resulting therefrom.' " *Isaacs v. Huntington Memorial Hosp.*, 38 Cal.3d 112, 123, 695 P.2d 653, 211 Cal.Rptr. 356 (1985). Foreseeability of future harmful activity may be established other than by evidence of prior similar incidents on the premises. *Id.* at 129; *Musgrove v. Ambrose Properties*, 87 Cal.App.3d 44, 51, 150 Cal.Rptr. 722, 725 (1978) (shopping center owner found liable when patron injured by bicycle; owner knew bicycles were commonly ridden on the premises but had never received a complaint before). In analyzing foreseeability, California courts follow "the well-settled rule that 'what is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence.' " *Isaacs v. Huntington Memorial Hosp.*, 38 Cal.3d at 129; *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal.3d 49, 57-58, 665 P.2d 947, 192 Cal.Rptr. 857, 861-62 (1983).

Thus, the appropriate inquiry here is whether the government had a duty to take appropriate measures to restrain its personnel from priming carburetors by pouring gasoline into them in the residential area, when the evidence showed the Navy was aware that this practice, while relatively common, was unsafe. Without a doubt, there was such a duty.

As its regulations show, the Navy freely permitted "minor mechanical repairs" of automobiles to be performed in residents' garages and carports without fully defining what those were. Service people frequently did tune-ups and more complicated repairs on their cars there. RT 119. The Navy also permitted gasoline to be stored in garages. RT 167. The Navy was aware that the common practice of priming a carburetor by pouring gasoline directly into it was unsafe, yet it took no steps to directly restrain that practice. In its official investigatory report following the accident, the Navy expressly acknowledged that *"using gasoline to prime the carburetor is not a safe practice but is relatively common."* (emphasis added).

Having the knowledge that priming a carburetor with gasoline can be unsafe but is relatively common imposed on the Navy a duty to make an attempt to stop or regulate the activity. The Navy could have prohibited the practice altogether, or required that it be performed outdoors, or at the very least instructed service people not to engage in it without making sure that no children are playing nearby. The failure of the Navy to take such simple steps to address this known problem demonstrates a breach of its duty to maintain safe premises and establishes its direct liability for Christa Washington's injuries.

III.

EVEN IF THERE WERE AN ACTUAL CONFLICT IN THE CIRCUIT COURTS ON THE QUESTION PRESENTED – AND THERE IS NONE – IT WOULD BE INAPPROPRIATE FOR THIS COURT TO RESOLVE IT IN THE CONTEXT OF THIS CASE AND PREMATURE IN ANY EVENT.

Buried in the middle of the government's petition is the contention that "there is an express conflict in the

circuits on the question presented." Pet., 10. The government draws this conclusion from the District of Columbia Circuit's criticism of *Lutz v. United States*, 685 F.2d 1178 (9th Cir. 1982) in *Nelson v. United States*, 838 F.2d 1280, 1283 (D.C. Cir. 1988) ("We doubt the adequacy of the *Lutz* rationale"). However, upon closer examination, it becomes clear that no actual conflict exists, particularly with respect to *this case*. And even if a budding conflict could be postulated, it is far too early for this Court to consider the matter.

Lutz and *Nelson* arose on virtually identical fact patterns and came to different conclusions as to the government's respondeat superior liability for a serviceman's failure to control his dog, which bit a child. Yet despite this seeming conflict, and despite the *Nelson* court's express criticism of *Lutz*, there is no actual conflict because each circuit's decision is based on local law. As we explained earlier (see p. 10, n. 6), *Lutz* is expressly based on Montana's law of respondeat superior, which imposes liability on an employer for the acts of an employee which further the employer's interest. 685 F.2d at 1182. Citing Montana authority, the Ninth Circuit concluded that the serviceman's performance of his duty to control his dog "furthered the interests of the Air Force," and thus held he acted within the scope of his employment. *Id.* at 1183. Similarly, *Nelson* is based on the law of respondeat superior as applied by the District of Columbia. And while the test is similar to Montana's (whether the employee was furthering his employer's interest), the *Nelson* court's citation of District of Columbia authorities indicates the test is narrowly applied there. *Id.* at 1282-83. Thus, in grounding their decisions on local precedent, both circuits satisfied the FTCA's requirement that scope

of employment be defined by local law.[11] "As to questions controlled by state law . . . , conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

There is a second reason that no real conflict exists between *Lutz* and *Nelson*. The *Nelson* court's discussion of respondeat superior liability, with its criticism of *Lutz*, is unnecessary to the court's holding – which is that the government was directly liable for the child's injuries as a landowner with knowledge that the dog was dangerous. 838 F.2d 1285-87.[12] The appellate court *affirmed* the district court's judgment of liability. Thus, the court of appeal's rejection of liability based on a respondeat superior theory is by no means the holding of the case. There is serious question whether any District of Columbia court would be bound by it.

Third, even assuming a possible conflict between *Nelson* and *Piper* on the one hand and *Lutz* on the other, it

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[11] The same is true of *Piper v. United States*, ___ F.2d ___ (8th Cir. 1989), decided by the Eighth Circuit after the petition for certiorari was filed in this case. *Piper* is another dog bite case, like *Lutz* and *Nelson*. The court held that a serviceman who failed to control his dog was not acting within the scope of his employment. Although the court states it "decline[s] to follow" *Lutz*, and "adopt[s] the reasoning" of *Nelson*, it reaches its conclusion by applying Arkansas principles of respondeat superior.

[12] By the same token, the Eighth Circuit in *Piper* remanded the case to the district court to determine whether the government might be liable under a similar theory.

does not follow a conflict exists between *Nelson* and *Piper* and *this case*, which arose on very different facts. (Significantly, the *Piper* court does not even cite *Washington*, even though it was decided eight months previously.) *Nelson*, *Piper*, and *Lutz* all involve a base regulation requiring service people to control their dogs. The government (like the *Nelson* and *Piper* courts) expresses the fear that imposing liability for this and other such "housekeeping" duties would make the government " 'an insurer as to all manner of bizarre incidents' occurring on military bases." Pet., 6, 10. Such language should not obscure what happened in this case: a child resident of a military base was horribly and permanently injured by the admitted grossly negligent conduct of two servicemen, conduct which violated fire prevention and base security regulations whose express goal was "the *total prevention* of loss of life and property by fire" because "fire hazards are not acceptable within the naval establishment." As the Ninth Circuit observed, "It is difficult to think of an older or more critical military duty imperative than the prevention of fire in camps and quarters." *Washington v. United States*, Pet. App., 6a. This duty is far from trivial, and its violation resulted in a fire that was hardly "bizarre;" sadly, it was all too predictable.

Moreover, it was a duty expressly imposed upon all service personnel, not just base residents, and its breach could give rise to military discipline. The government, echoing Judge Bork's reasoning in *Nelson*, attempts to draw a distinction between regulations governing employees and those governing base residents, contending that only the former can define a service person's scope of employment. Whether or not such a distinction

makes sense in the context of military life is not an issue in this case, since the key regulations at issue here expressly applied to all "Personnel":

> e. *Personnel* are responsible for (1) Compliance with Fire Regulations. . . .C.A. E.R. Exh. D, at 3. See also *id.* at 1 ("the prevention of fire in administrative and quarters areas is a moral and legal responsibility of *all personnel.* . . ."). (Emphases added.)

That "Public Quarters Residents," including spouses and children, were *also* responsible for compliance with the regulations does not change their status as separate and independent duties imposed on employees.

Finally, even if *Nelson* (and now *Piper*) are seen to conflict with the Ninth Circuit's decisions, the government exaggerates the extent of the conflict among the circuits. The government hints at a conflict between the Ninth and First Circuits, based on the First Circuit's rejection of the argument that " 'anything [a serviceman] was doing in the residence was in the scope of his employment.' *Merritt v. United States*, 332 F.2d 397, 399 (1964)." Pet., 10, n. 10. But of course the Ninth Circuit is in complete agreement. "We do not suggest that every act of a base resident is within the scope of his employment. Such a rule would impose upon the military a liability far broader than that of a private employer, contrary to the limited waiver intended by the FTCA." *Lutz*, 685 F.2d at 1183.

In short, even if a conflict can be said to exist, the lower courts have not yet had the opportunity to thoroughly flesh out the issues.[13] As we suggest here, it is possible to harmonize all the decisions as based on local law; future litigation may develop that thesis further. There is much to be said for letting early conflicts ripen, subjecting them to the tests of time, thought, comment and advocacy before this Court steps in to resolve them. See *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date").

In view of the real doubt whether a conflict exists at all (especially with respect to this case), and if, so, whether the lower courts have had ample time and opportunity to develop the issues, it is not surprising the government buried its claim of conflict in the middle of its petition, without highlighting it as a Question Presented. If even the government does not take its claim of conflict seriously, there is hardly cause for this Court to do so.

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[13] In *Piper*, the Eighth Circuit simply adopts the reasoning and language of the *Nelson* decision.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PATTERSON, RITNER, LOCKWOOD,
ZANGHI & GARTNER
JOHN ZANGHI
GREGORY P. ORLAND*
3580 Wilshire Boulevard,
Suite 1500
Los Angeles, California 90010
Telephone: (213) 487-6240

GREINES, MARTIN, STEIN & RICHLAND
MARTIN STEIN
KENT L. RICHLAND
BARBARA W. RAVITZ*
9601 Wilshire Boulevard, Suite 544
Beverly Hills, California 90017
Telephone: (213) 859-7811

* Counsel of Record

Counsel for Respondent